Indigenous Rights in Freshwater: Mapping the Contested Space in Australia, New Zealand and Canada

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Introduction

The security and sustainability of freshwater resources are constant and critical concerns in many countries. The impacts of climate change, pollution and over-use have rapidly become more evident, alongside ever strengthening economic and environmental demands (and sometimes cross-jurisdictional tensions). In this setting Indigenous[4] interests in water, often of timeless social, cultural, spiritual and economic importance,[5] have struggled to find any meaningful political attention.[6] And while western law[7] has stumbled for many years towards land justice, this has often come with a conspicuous disregard for 'water justice' and Indigenous priorities and knowledge systems around water. The issue of Indigenous water rights is now shaping, across various countries, to be one of the most important politico-legal challenges of our time. It holds great significance for the future of Indigenous communities, and for any prospect of true 'reconciliation'.[8]

The last thirty years have seen significant developments in the recognition of international Indigenous rights. Of particular importance is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which carries considerable legitimacy and represents the fullest

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4 This term is used in this article where the reference is international (or a paraphrasing of legislation or policy etc), in other places preferred country (or region) terminology is adopted.

5 See generally Moggridge BJ and Thompson RM, 'Cultural Value of Water and Western Water Management: an Australian Indigenous Perspective' (2021) 25 *Australasian Journal of Water Resources* 4; Jackson S, Woods R and Hooper F, 'Empowering First Nations in the Governance and Management of the Murray-Darling Basin' in Hart B et al (eds), *Murray-Darling Basin, Australia: Its Future Management* (Elsevier, Amsterdam, 2020). Waitangi Tribunal, *Stage 2 Report on the National Freshwater and Geothermal Resources Claim* (WAI 2358, 2019) (Waitangi Tribunal, *Freshwater Report*); Tau TM, *Water Rights for Ngāi Tahu: A Discussion Paper* (Canterbury University Press, 2017); Assembly of First Nations, National First Nations Water Strategy (2012), https://www.afn.ca/wp-content/uploads/2019/06/12-20-National-First-Nations-Water-Strategy.pdf; and Borrows J, "Living between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47(4) University of Toronto Law Journal 417.

6 Godden L, Jackson S and O'Bryan K, 'Indigenous Water Rights and Water Law Reforms in Australia' (2020) 37 EPLJ 655, 666.

7 Preferred terminology varies across countries, but the term 'western law' (referencing historical legal roots) is used here broadly to refer to the law and governance systems of the countries examined that are not sourced in Indigenous law - and includes Constitutions, common law and legislative frameworks.

8 Tau, above xxx; Down S, 'Indigenous Rights and Freshwater in New Zealand' (2019) 162 *Arena* 23.

expression of Indigenous self-determination adopted by the UN to date.[9] In more recent international legal documents Indigenous water rights have been more explicitly addressed, including in Principle 3 of the 2018 Brasília Declaration of Judges on Water Justice which provides that "[I]ndigenous and tribal peoples' rights to and relationships with traditional and/or customary water resources and related ecosystems should be respected, and their free, prior, and informed consent should be required for any activities on or affecting water resources and related ecosystems."[10] Despite this recognition, there is a gulf between the international standards and state recognition of Indigenous freshwater rights. This is particularly true of Australia, New Zealand and Canada.

We come to this article as non-Indigenous legal scholars who share a commitment to the benefits of comparative analysis and, from working with Indigenous communities in our own regions, a determination to open more space for Indigenous voices in law reform debates. Water is one context where western law and policy appears to have failed – abjectly – to understand, articulate and accommodate Indigenous rights and interests. There seems to have been many contributing factors, including the calcified nature of western property law concepts, the dominance of western priorities and competition for this resource, and persistently narrow conceptions of historical and contemporary Indigenous existence.[11] We don't profess to speak for people or places - but rather to highlight these lingering barriers to a better discussion with Indigenous communities, to identify the more promising recent developments, and to put down a place-marker in this important collection of work to facilitate the cooperation and collaboration that must happen for meaningful progress on these critical issues.

The jurisdictions we draw together in this article have well-recognised differences in legal backgrounds. These arise from (for example) the history of treaties in Canada and the Treaty of Waitangi in New Zealand; the early history of statutory conversion of Māori interests; the contemporary constitutionalisation of Aboriginal rights in Canada; the comprehensive statutory regulation in Australia; and differing positions on the fiduciary duties or 'honour' of the Crown. We could undertake a detailed analysis to rationalise these differences and to excavate and emphasise the commonalities – for example the transnational legal heritage; the parallels in colonial histories and oppression of Indigenous peoples; the convergences in western ideological trajectories; or indeed the ongoing legal cross-fertilisation. Yet our motivation for this article is simpler. While transplanting principles without context is fraught with difficulties, comparing ideas and outcomes is essential. There will inevitably be some variation in focus, as we explore the state of play and pathways forward in these countries, based on the background differences and natural variation in contemporary priorities. However, we begin from the proposition that differences in the treatment of Indigenous peoples across countries do not preclude comparison, but rather demand it.[12]

As Australia, New Zealand and Canada seek to implement the UNDRIP and move towards reconciliation with Indigenous peoples, there is increasing attention on how space can be made within, or alongside, the western legal system for Indigenous peoples' laws and governance systems. These countries' shared colonial legacy of "settlement" brought with it the imposition of settler legal systems, largely in disregard of the sophisticated existing laws of the Indigenous communities already in occupation of the land. To varying degrees, the colonial project in each country not only

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9 For a general discussion, see Charters C and Stavenhagen R (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, 2009).

10 Brasília Declaration of Judges on Water Justice (10 Principle Declaration), 8th World Water Forum, Brasília (Brazil), 21 Mar. 2018, Principle 3).

11 Butterly L and Richardson BJ, 'Indigenous Peoples and Saltwater/Freshwater Governance' (2016) 8(26) ILB 3, 3.

12 See further Young S, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008), Part 1.

displaced Indigenous peoples from their territories but sought to displace Indigenous legal orders and governance structures. Yet, Indigenous laws continue to exist in fact as a separate source of law in all three countries (albeit often unrecognised and constrained in its practice by the state). Increasingly, however, there is a push to recognise and make genuine space for Indigenous laws and systems of governance, and to embrace plurinationalism, with a view to creating a new relationship[13] which recognises that reconciliation between the colonial state and Indigenous peoples also requires reconciling with the earth.[14]

Australia

The State of Play

The impacts of water over-use and pollution[15] – and the unpredictable extremes of climate change – are exacerbated in Australia by widespread periodic drought and long-standing institutional tensions[16] over the most intensively used catchment: the Murray-Darling Basin. The Australian legal heritage long denied even the most basic of First Nations' entitlements to their water, let alone entitlements that respected the significance of traditional connections to water or could support those deep connections in competitive contemporary contexts. By the time the Australian law began to catch up with historical realities and transnational legal theory, the dynamics of scarcity, degradation and competition ensured that rediscovering and recognising First Nations' water rights would not be a simple exercise.

Reflecting on the Australian history, the celebrated Wiradjiri Nyemba scholar Virginia Marshall has explained that the Australian position has rested upon and perpetuated a notion of 'aqua nullius'.[17] There has been long-standing neglect of the centrality of water to First Nations' cultural identity and well-being, neglect of community diversity, and particular neglect of the economic and management dimensions of First Nations' interests.[18] As will be seen a more honest and reflective engagement with First Nations' water rights has only emerged recently in Australia – and progress on the ground remains piecemeal and politically fragile.[19]

Exclusion, commodification, environmentalism and soft consultation

The historic western legal coupling of land and water rights had obvious implications in a country long committed to the pretense of 'terra nullius': no inherent First Nations' land rights (to which

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13 Morales S and Nichols J, *Reconciliation beyond the Box: The UN Declaration and Plurinational Federalism in Canada* (Centre for International Governance Innovation, 2018), https://www.inclusion.ca/site/uploads/2018/11/Reconciliation-beyond-the-Box_web.pdf.

14 Borrows J, "Earth-Bound: Indigenous Laws and Environmental Reconciliation" in Asch M, Borrows J and Tully J (eds) *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press, Toronto, 2018).

15 For a discussion of water scarcity in Australia, and the causes and scope of water quality problems, see Gardner A, Bartlett R, Gray J and Nelson R, *Water Resources Law* (2nd ed, Lexis Nexis, Chatswood NSW, 2018), chap 1.

16 See generally Webster A, 'Reflecting on the Waters: Past and Future Challenges for the Regulation of the Murray-Darling Basin' (2019) 40 *Adelaide Law Review* 249.

17 Marshall V, 'Deconstructing Aqua Nullius: Reclaiming Aboriginal Water Rights and Communal Identity in Australia' (2016) 8(26) ILB 9; Marshall M, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, Canberra, 2017).

18 See generally Marshall (2016), n ??? at 9; Hartwig LD, Jackson S, Markham F and Osborne N, 'Water Colonialism and Indigenous Water Justice in South-Eastern Australia' (2022) 38 *International Journal of Water Resources Development* 30.

19 Godden, Jackson and O'Bryan, n ??? at 678.

water could attach) were recognised.[20] Yet that disreputable legal background and the pivotal decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 need closer thought here. The 'extinguishment' principles laid down in *Mabo* effectively legitimised and entrenched the priority colonial take up of land with water access; as explained by Kamilaroi water scientist Brad Moggridge '[w]hen we became human … good land and water was gone'.[21] And *Mabo* effectively confirmed the non-compensability of any impact on native title right up to 1975.[22] Moreover, even where past dealings might technically leave some native title rights unextinguished, 200+ years of actual impeded access to water resources (and increasing competition and overuse) would inevitably make it more difficult in that context for First Nations to meet the 'continuity' inquiries attending any contemporary claim. These points are just the start of the difficulties; the cumulative contemporary obstacles to progress on water rights through native title processes are returned to below.

In the formative years of expansion, agricultural growth in Australia and increasing demands on water in critical catchments prompted the 'vesting' of water (in various terms) in the respective Crowns, and the incremental introduction of water schemes and licensing.[23] These initiatives tended to further tie up water resources in western processes – legally, politically and administratively – and further entrench the invisibility of First Nations' prior connections. The first significant contemporary reforms in water regulation, which crystalised in the early 1990s, brought a stronger focus on efficiency and environmental restoration – particularly through allocation limits, 'unbundling' of land and water, and environmental flows.[24] First Nations' interests still remained largely invisible – with the new rationale that they were adequately accommodated by the environmental initiatives, the availability of site-specific cultural heritage protection, and the native title regime emerging from the 1992 *Mabo* decision.[25]

The National Water Initiative (NWI) – a 2004 intergovernmental agreement on national principles for water law reform – focussed on water planning and accounting, expansion of trading, efficiency, investment confidence, environmental certainty, and security of supply. Environmental limits were given higher priority. The further unbundling and 'commodification' of water (that could further separate it from cultural context[26]) still came with only slim attention to planning for First Nations' interests and relevant impacts. The directions for attention to Indigenous voices and objectives[27] in water planning tended to be soft-edged (eg 'wherever possible'),[28] and still deferential to native title and other sources of strict legal entitlement. Most particularly, there was ongoing neglect of First Nations' economic interests and participation and little attention to how First Nations communities might compete in the new reality.[29] Building on the momentum of the NWI, and responding to the

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20 See generally Jackson, Woods and Hooper, n ??? at 10.

21 Archibald-Binge E, *Indigenous groups in Murray-Darling Basin fight to have their voices heard over water rights'* (ABC, May 2021): https://www.abc.net.au/news/2021-05-26/indigenous-water-rights-murray-darling-basin-730/100166380.

22 The time of the passage of the *Racial Discrimination Act 1975* (Cth). See further *Northern Territory v Griffiths (on behalf of Ngaliwurru and Nungali Peoples)* (2019) 269 CLR 1. Note however further agitations of the point – particularly eg *Yunupingu (on behalf of the Gumatj Clan or Estate Group) v Commonwealth* (Federal Court, NTD43/2019, 28 November 2019): https://www.comcourts.gov.au/pas/file/Federal/P/NTD43/2019/actions.

23 See generally Gardner, Bartlett, Gray and Nelson, n ???, Chap 9.

24 Gardner, Bartlett, Gray and Nelson, n ???, Chap 12.

25 See eg O'Bryan K, 'The National Cultural Flows Research Project: a Game Changer for First Nations' Water Resource Management and Use in Australia' (2018) 33 *Australian Environment Review* 158, 158; Godden, Jackson and O'Bryan, n ??? at 655.

26 Butterly L and Richardson BJ, n ??? at 4.

27 See particularly clauses 52–54.

28 See Marshall (2016), n ??? at 9; Godden, Jackson and O'Bryan, n ??? at 663.

29 Butterly L and Richardson BJ, n ??? at 4; Marshall (2016), n ??? at 9–10; Godden, Jackson and O'Bryan, n ??? at 663; Jackson, Woods and Hooper, n ??? at 20.

extended drought of the 2000s, the *Water Act 2007* (Cth) shored up Commonwealth management 'in the national interest' of the intensively used and politically fraught Murray-Darling Basin.[30] The narrow attention to First Nations' interests (beyond cross-reference to native title)[31] and the strengthening focus on the controversial economic/environment balancing exercise continued.[32] The evolving progress under this 2007 Act (and the resulting 2012 'Basin Plan') is returned to below.

It can be seen then that from the perspective of First Nations' interests, the scaffolding of Australian water reform has for some time tended to conflate environmental and Indigenous issues, provide only soft consultation obligations in respect of the latter, and conspicuously neglect the issue of First Nations' economic participation in the new 'water market'.[33] Large scale extractions and lack of First Nations consultation in important reviews remain highly contentious.[34] A significant part of the problem it seems has been the inclination of water law and policy-makers to push the difficult issues down the road to native title processes. How did that fare?

The limitations of native title

Whilst Australian native title explicitly extends to water resources,[35] in recent years commentators have tended to just note that it has been something of a failure in this context and turn their attention to the promise of other political and regulatory progress. Yet the reality is that policymakers appear to have been waiting for native title advances (or some other legal lead to defer to).[36] The discussion above indicates that native title, in particular, preoccupies much of the political thinking on First Nations' water rights in Australia - and that there is (ostensibly at least) implicit faith in its ability to deliver appropriate outcomes.

Some of the fundamental problems with native title in this context were mentioned above. The native title principles have entrenched the early colonial take up of watered land and imposed exacting continuity tests[37] that might be difficult to meet in the shadow of that history. It should also be noted that in the context of water, historic extinguishment or impairment could come in many forms: legislative vesting (in some form) of water in the Crown; regulatory prohibition on diversion without licence; the grant of directly inconsistent interests; Crown reservation for purposes of water protection or development; or public infrastructure works.[38] Even where the extinguishing effect of these past actions is now understood to have been technically limited, they could still have had a significant impact. As explained below, an earlier partial extinguishment just of any native title rights of 'exclusivity' or 'control' (such as in the case of water vesting or possibly reservation)[39] is of amplified significance in the Australian context. Moreover, even interferences later found to be

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30 See s 3.

31 See ss 21, 22, 204, and Sched 3 cl 4 of the original 2007 Act.

32 Godden, Jackson and O'Bryan, n ??? at 665; Jackson, Woods and Hooper, n ??? at 2.

33 See particularly Marshall (2016), n ??? at 10.

34 See eg Fitzgerald R, 'Roper River will 'disappear', traditional owners say, as government considers massive water allocation' (ABC Feb 2022): https://www.abc.net.au/news/2022-02-08/indigenous-owners-call-for-nt-government-to-reject-water-licence/100812012; Jonscher S, 'Sacred sites and water rights' (ABC Oct 2021): https://www.abc.net.au/news/2021-10-08/singleton-station-water-licence-indigenous-sacred-sites/100471044; Radio National, 'Martuwarra Fitzroy River: First they came for the land' (July 2021): https://www.abc.net.au/radionational/programs/earshot/martuwarra-fitzroy-river/13419878; Archibald-Binge E, *Indigenous groups in Murray-Darling Basin fight to have their voices heard over water rights'* (ABC, May 2021): https://www.abc.net.au/news/2021-05-26/indigenous-water-rights-murray-darling-basin-730/100166380.

35 Most importantly, see *Native Title Act 1993* (Cth), s 223.

36 See Godden, Jackson and O'Bryan, n ??? at 656.

37 See particularly *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 and *Bodney v Bennell* (2008) 167 FCR 84.

38 Gardner, Bartlett, Gray and Nelson, n ???, at 263ff.

39 See *Western Australia v Ward* (2002) 213 CLR 1 esp at [209]ff, [263].

temporary (as opposed to extinguishing)[40] could have significance as regards the required continuity of traditional connection. And just as importantly, the cumulative impact of this history of Crown control, on public and political mindsets,[41] is inevitably difficult to shift in the negotiation or determination of contemporary water claims.

The point about past loss of 'exclusivity' deserves further explanation. The Australian native title jurisprudence was for some time tied to a 'list of traditional activities' approach to the content of the interest - in part a product of the 'bundle of rights' methodology that emerged through the case law after *Mabo*[42] and crystallised restrictively in *Western Australia v Ward* (2002) 213 CLR 1. This approach lingered stubbornly in the case of non-exclusive native title[43] – particularly (it seems) in the context of water. The inertia of thinking on water is not surprising in light of the history explained above, and indeed the reasoning in *Ward*. In that critical decision there was a conspicuous downplaying of the signifiers of traditional control (eg rights to be asked for permission and to 'speak for country')[44] that might encourage recognition of broader native title rights in the context of water. Similarly, there was particular attention (in framing the entitlements narrowly) to the fact that s 223 of the *Native Title Act 1993* (NTA) seeks to identify and accommodate 'rights and interests' with no mention of duties and obligations.[45] What this all means for present purposes is that in native title determinations water rights have often received little attention, and where they make it through the challenges of competing use, politics and disparity of bargaining position[46] they have been consistently confined to narrow uses – eg use for 'personal, domestic, cultural or non-commercial communal purposes'.[47] There is obviously little support offered here for First Nations' participation in economic uses or water management.[48] Commentators have lamented that what has been grudgingly conceded would often be available to the public at large in any event.[49]

There are additional difficulties with the native title framework in the context of water. Native title processes tend to deal in a segmented way with communities sharing connections with large water sources – which has obvious implications for the coherency of rights and management strategies.[50] Furthermore, while the 'future act' provisions of the NTA provide some machinery for negotiated

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40 See eg *Akiba v Commonwealth* (2013) 150 CLR 209; *Western Australia v Brown* (2014) 253 CLR 507; *Queensland v Congoo* (2015) 256 CLR 239.

41 See also the invitation (widely taken up) in s 212 of the *Native Title Act 1993* (Cth) for governments to *confirm* any existing ownership by the Crown of natural resources and any existing right of the Crown to use, control and regulate the flow of water (as well as existing public access to and enjoyment of waterways / beds, banks and foreshores etc).

42 See particularly *Fejo v Northern Territory* (1998) 195 CLR 96. See further Young (2008), n ???, Part IV.

43 See further Young S, 'The Increments of Justice: Exploring the Outer Reach of *Akiba's* Edge Towards Native title 'Ownership'' (2019) 42 *The University of New South Wales Law Journal* 825.

44 See esp at [14], [90] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); cf [821] (Callinan J).

45 See esp at [14] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

46 See generally O'Bryan K, 'More Aqua Nullius? The *Traditional Owner Settlement Act 2010* (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources' (2016) 40 *Melbourne University Law Review* 547.

47 See eg *Turner v South Australia* [2011] FCA 1312; *Joseph (on behalf of Tableland Yidinji People) No 3 v Queensland* [2013] FCA 280; *Cheinmora v Western Australia (No 3)* [2013] FCA 769; *Limmerick (on behalf of Ngarlawangga People) v Western Australia* [2016] FCA 1442; *Doctor (on behalf of Bigambul People) v Queensland* [2016] FCA 1447. Cf also in this regard the narrow protections of s 211; and the limitations in the regime established by the *Traditional Owner Settlement Act 2010* (Vic).

48 And any recognised right to protect scared sites or places is limited in value owing to site-specificity – see eg O'Bryan (2016), n ??? at 571.

49 O'Bryan (2016), n ??? at 570, 572; Godden, Jackson and O'Bryan, n ??? at 660.

50 See eg Martuwarra RiverOfLife, Poelina A, Bagnall D and Lim M, 'Recognizing the Martuwarra's First Law Right to Life as a Living Ancestral Being' (2020) 9(3) *Transnational Environmental Law* 541, 558.

advances in this field,[51] in substance they provide only light prospective protection for claimed or determined native title water rights. Most particularly, s 24HA (inserted by 1998 amendments) facilitates the making, amendment or repeal of legislation (or the grant of a lease, licence, permit or authority) relating to the management or regulation of surface and subterranean water (or living aquatic resources) [52] – with only rights to 'be notified' and 'comment' conferred on native title claimants and holders (and only in the case of leases, licences etc).[53]

Overall, it is not surprising that important Australian commentary on First Nations water rights has tended to abandon native title aspirations.[54] Yet it has also been emphasised, as per the earlier analysis in this paper, that policy frameworks are highly influenced 'by the conception of Indigenous water rights under native title'.[55]

Tellingly, as key studies have emphasised, in Australia there is marked disparity between Indigenous and non-Indigenous water holdings - and indeed between Indigenous land holdings[56] and Indigenous water holdings. Most starkly, it has been noted that in the NSW portion of the Murray-Darling Basin, Aboriginal entities hold only about 0.2 percent of the available surface water, whereas the Aboriginal population in the area is over 9 percent[57] and growing.[58]

Pathways forward

Strengthening representative voices,[59] First Nations' policy statements[60] (against the backdrop of the UNDRIP[61]), and significant collaborative research[62] have driven some recent advances in

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51 Note the general application (and hence potential relevance) of ss24BA-EC (ILUAs) and subdivision P (right to negotiate).

52 For other future act protections of some relevance see eg s 24JA (reservations); s 24KA (public works); s 24MD (compulsory acquisitions) – see generally the discussion in Gardner, Bartlett, Gray and Nelson, n ???, at 269ff.

53 The action is declared to be valid subject to the application of the non-extinguishment principle and potential compensation (which would be more significant but for the consistently narrow framing of the relevant native title rights). The procedural rights conferred have been held to be quite limited and have proven difficult to enforce - see O'Bryan (2016), n ???; Gardner, Bartlett, Gray and Nelson, n ???, at 270.

54 See eg Durette M, 'Indigenous Legal Rights to Freshwater: Australia in International Context', *CAEPR Working Paper No 42/2008* (ANU), pp vi–ix; Marshall M, *Overturning Aqua Nullius: Securing Aboriginal Water Rights* (Aboriginal Studies Press, Canberra, 2017); Macpherson EJ, *Indigenous Water Rights in Law and Regulation* (Cambridge University Press, 2019) pp 50, 97–98). See further (eg) Hartwig LD, Jackson S and Osborne N, 'Recognition of Barkandji Water Rights in Australian Settler-Colonial Water Regimes' (2018) 7 *Resources* 1.

55 Macpherson, n ??? at 50.

56 In addition to native title, note the (piecemeal) relevance of land rights legislation and purchases by the Indigenous Land Corporation: see generally Jackson, Woods and Hooper, n ??? at 9.

57 Hartwig, Jackson, Markham and Osborne, n ???.

58 Jackson, Woods and Hooper, n ??? at 3.

59 See eg First Peoples Water Engagement Council (FPWEC); Northern Basin Aboriginal Nations (NBAN); Murray Lower Darling Rivers Indigenous Nations (MLDRIN); North Australian Indigenous Land and Sea Management Alliance (NAILSMA). For discussion of the history of MLDRIN and NBAN see Jackson, Woods and Hooper, n ??? at 12ff.

60 See eg Boomanulla Statement (2002); Indigenous Peoples Kyoto Water Declaration (2003); Echuca Declaration (2007); Mary River Statement (2009); Policy Statement on North Australian Indigenous Water Rights (2009); Garma International Indigenous Water Declaration (2009); Victorian Traditional Owner Water Policy Framework (2014); Fitzroy River Declaration (2016) – discussed in O'Bryan (2018), n ??? at 158.

61 Endorsed by Aust in 2009 – see articles 11, 12, 18, 19, 20, 21, 25, 26, 27, 32, 28, 29, 32.

62 National Cultural Flows project (2011-2018): https://culturalflows.com.au/.

Australia. As noted above progress remains piecemeal, often more procedural than substantive,[63] variable in the depth of First Nations engagement, and politically fragile. However, some notable initiatives provide a platform for further discussion and reform. These examples illustrate the importance of flexibility in thinking to accommodate the different circumstances and priorities of communities across the country. They also reveal some legacies of earlier thinking – eg some lingering conflation of environmental and Indigenous interests.[64]

Political and regulatory advances

Putting aside broader difficulties of implementation, the *Water Act 2007* (Cth) and resulting Basin Plan 2012 have been 'slowly evolving' in their management of the market-focused Murray-Darling Basin regime to open space for more First Nations' access and management participation.[65] Consultation obligations have been strengthening - particularly through engagement provisions, requirements for inquiry into First Nations' uses and priorities, and collaboration in water resource plan review.[66] First Nations representation is also strengthening, on the Murray-Darling Basin Authority itself and on an advisory Basin Community Committee (and its required Indigenous water subcommittee).[67] Yet it has been noted that there remains little explicit acknowledgment of First Nations' economic interests, that broad administrative discretion remains, and that decision-making powers tend to stay with less-representative bodies (or the relevant Minister) – still falling short of First Nations' aspirations for involvement in decisions.[68] It should be added, however, that relationship building and engagement has also been improving at state level in the Murray-Darling Basin.[69]

In terms of actual entitlements, while the important Echuca Declaration of 2010[70] prominently articulated an 'inherent right' to water entitlements sufficient 'to improve the spiritual, cultural, environmental, social and economic conditions' of the Murray and Lower Darling River Indigenous Nations,[71] progress on the ground (via cultural licences or funding for market entry) remains slow. The inherent use limitations and administrative complexity of cultural licences (such as in NSW) has resulted in limited uptake, and entry into the general water market poses significant challenges for First Nations communities in terms of high costs (and opportunity costs), the political vagaries of funding,[72] state reluctance to pursue genuine re-allocation,[73] communities' own concerns about

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63 See particularly Hartwig, Jackson, Markham and Osborne, n ???; Jackson, Woods and Hooper, n ???, at 2.

64 See Jackson, Woods and Hooper, n ??? at 3; Godden, Jackson and O'Bryan, n ??? at 656.

65 See Godden, Jackson and O'Bryan, n ??? at 663; Jackson, Woods and Hooper, n ??? at 16ff. For ongoing policy development at the federal level, see Australian Government Productivity Commission, *National Water Reform 2020 – Productivity Inquiry Report* (May 2021), chap 9.

66 See *Water Act 2007* (Cth) ss 22, 172 and Sched 3 cl 4; *Basin Plan 2012* Chap 10 Part 14 and Sched 1. For a broad examination of the history of the evolving consultation efforts of the Murray-Darling Basin Authority, see Jackson, Woods and Hooper, n ??? at 10ff.

67 See esp *Water Act 2007* (Cth) ss 177, 202.

68 See particularly Godden, Jackson and O'Bryan, n ??? at 667-668.

69 See Jackson, Woods and Hooper, n ??? at 18ff.

70 MLDRN Echuca Declaration 2007: https://www.mldrin.org.au/wp-content/uploads/2018/07/Echuca-Declaration-Final-PDF.pdf. See generally Jackson, Woods and Hooper, n ??? at 15ff.`

71 Later emphasised in the Cultural Flows project: Godden, Jackson and O'Bryan, n ??? at 669.

72 See eg Sullivan K, 'Time to deliver promised funding for First Nations water in Murray-Darling Basin, says Labor', ABC July 2021: https://www.abc.net.au/news/2021-07-11/first-nations-water-government-funding-murray-darling-basin/100279140; Compare also (eg) the cessation of the NSW Aboriginal Water Initiative Program (2012-2017), but note (eg) funding advances in Victoria: Jackson, Woods and Hooper, n ??? at 19.

73 See generally Jackson, Woods and Hooper, n ??? at 10; cf Jasper C, 'Traditional owners say missing out on rare opportunity to access water rights is a step backwards' (ABC, May 2021):

over-allocation, and potential competition for funds with other marginalised interests (and potentially between First Nations communities).[74]

Victoria, perhaps the state most attuned to the limitations of native title,[75] has made some significant progress in respecting the role of Traditional Owners in water management.[76] Most prominently, the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) (which included Wurundjeri language and was marked by a Traditional Owner address to parliament) recognised the Yarra River as 'one living and integrated natural entity'.[77] It reset the policy and planning framework for the river, established the advisory 'Birrarung Council' (with provision for Indigenous membership), and set out 'protection principles' (including on cultural matters) to guide relevant public decision-making. Yet it has been noted that the Council (with small Indigenous representation) is advisory only,[78] and consistently with earlier thinking the explicit reference to 'economy' appears in the context of the greater population's prosperity.

In northern Australia, which was a later focus of regulatory attention but has relatively larger First Nations populations and landholdings, initiatives have in some ways stepped over the slow progress in the Murray-Darling Basin – particularly in terms of facilitating economic water participation for First Nations communities and businesses.[79] In Queensland, 2018 amendments to the *Water Act 2000* (Qld) give some specific priority (in water planning) to consultation on and consideration of 'cultural outcomes' (as distinct from broader environmental objectives).[80] Cape York in particular[81] has benefitted from a unique history, with water reserves (established under agreements and legislation[82] in the late 1990s-2000s) having evolved into very significant economic entitlements - albeit with gaps in some important locations owing to pre-existing and over-allocation and infrastructure access problems.[83] In the Northern Territory, as ultimately reflected in amendments to the *Water Act 1992* (NT), water reserves have also facilitated First Nations' economic participation and produced some progressive consultation, representation and co-management arrangements. Yet again there are over-allocation gaps and infrastructure/access challenges, and some dependency on Indigenous land holdings.[84] Significant consultation is underway in Western Australia, notably in work on a new Fitzroy River water allocation plan which promises holistic management and parallel attention to cultural and environmental values and First Nations' economic opportunities.[85]

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https://www.abc.net.au/news/2021-05-25/traditional-owners-miss-out-on-victorian-water-rights/100159640.

74 See generally Godden, Jackson and O'Bryan, n ??? at 669–671.

75 See particularly the *Traditional Owner Settlement Act* 2010 (Vic) and *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

76 See O'Bryan (2018), n ??? at 160; and note esp the 2016 Water Plan and a 2018 water funding program.

77 Section 1.

78 Godden, Jackson and O'Bryan, n ???. See also however the broader corresponding initiatives in Victoria discussed there by the authors.

79 See generally Godden, Jackson and O'Bryan, n ??? at 671–2.

80 Section 1286A. For ongoing policy development and implementation in Queensland, see particularly Queensland Dept of Natural Resources, Mines and Energy, *Water Connections: Aboriginal People's Water Needs in the Queensland Murray-Darling Basin* (April 2019).

81 As to pockets of progress in other parts of Queensland, see Godden, Jackson and O'Bryan, n ??? at 673–74.

82 *Cape York Peninsula Heritage Act 2007* (Qld); and the *Wild Rivers Act 2005* (Qld) (see now the Cape York Water Plan 2019).

83 Godden, Jackson and O'Bryan, n ??? at 673, 677–8.

84 See generally Godden, Jackson and O'Bryan, n ??? at 674-78.

85 Managing water in the Fitzroy River Catchment: Discussion paper for stakeholder consultation, November 2020: https://www.water.wa.gov.au/__data/assets/pdf_file/0016/10087/115885.pdf. And note the important role played here by the Fitzroy River Declaration by native title groups in the area

Unexplored potential in native title

The frequent cross-reference to native title in water policy frameworks, and the piecemeal and fragile nature of broader political progress, suggest it is too early to abandon native title aspirations in the water context in Australia. In truth, even with strengthening international trajectories, the intense politics of water in Australia is a significant obstacle to meaningful recognition of First Nations' water rights through purely political processes. In such a context, pursuing recognised legal rights to their firmest position can be a critical step in turning aspirations into sustainable advances. And in the absence of treaties or constitutional recognition, or recognised Crown fiduciary duties, native title remains the primary legal means for redressing past land and water injustice in Australia.

Returning then to the unexplored potential of Australian native title in this field, some of the possibilities pressed by commentators include that we might now be in reach of recognising a 'right of participation' in decision-making,[86] or that the native title doctrine's promised respect for Indigenous perspectives requires recognition of traditional authority and guardianship over water bodies as a whole (as a more accurate reflection of connection).[87]

More immediately, based on recent Australian jurisprudence and strengthening First Nations' bargaining positions, native title negotiations and determinations are engaging more often and more closely with water rights. And critically, since the decision in *Akiba v Commonwealth* (2013) 150 CLR 209 native title in Australia is exhibiting a greater resistance to extinguishment,[88] and its potential content is expanding (even in the context of non-exclusive native title[89]) beyond the limited 'traditional uses' conceded by the earlier Australian jurisprudence.[90] This expanded thinking is emerging in more determinations (where supported by traditional laws and customs[91]) – most prominently in the recognition of a right 'to take resources for any purpose'.[92] This formulation has already appeared in the context of water.[93] The *Akiba* advance, signalling a more respectful and reflective accommodation of traditional laws and customs, also holds out some prospect of an easing in the exacting requirements for proof of continuity. The significance of the decision is perhaps not yet fully recognised.[94]

Finally, in this overview of emerging possibilities in Australia, it must be noted that since the decision in *Northern Territory v Griffiths (on behalf of Ngaliwurru and Nungali Peoples)* (2019) 269 CLR 1 questions of compensation for post-1975 and prospective extinguishment or impairment of native

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(referred to above): Poelina A, 'Martuwarra Fitzroy River Voice for Peace – World Rivers Day 2021' *Global Water Forum*: https://globalwaterforum.org/2021/09/29/martuwarra-fitzroy-river-voice-for-peace-world-rivers-day-2021/.

86 McCabe P, 'An Australian Indigenous Common Law Right to Participate in Decision-Making' (2020) 20 *Oxford University Commonwealth Law Journal* 52.

87 Martuwarra, n ??? at 557, 560, 562.

88 See eg Brennan S, 'The Significance of the Akiba Torres Strait Regional Sea Claim Case' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29; Edgeworth B, 'Extinguishment of Native Title: Recent High Court Decisions' (2016) 8(22) *Indigenous Law Bulletin* 28.

89 Moreover, the bar for surviving 'exclusivity' has been lowered somewhat – removing both some of the technical and instinctive opposition to recognition of broader entitlements. See particularly Bartlett R, 'Native Title Rights to Exclusive Possession, Use and Enjoyment and the Yindjibarndi' (2018) 43(1) *University of Western Australia Law Review* 92.

90 See further Young (2019), n ???.

91 See McCabe P, 'Pilki and Birriliburu: Commercial Native Title Rights after Akiba' (2015/2016) 19(2) *Australian Indigenous Law Review* 64.

92 See eg *Willis (Pilki People) v Western Australia* [2014] FCA 714; *Western Australia v Willis* (2015) 239 FCR 175 (appeal).

93 *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228.

94 See Young (2019), n ???.

title loom large. This can be important to the bargaining position of First Nations communities – particularly if it is post-*Akiba* conceptualisations of native title rights (including over water) that are to be valued for compensation purposes.

New Zealand

The State of Play

Māori marginalisation and widespread freshwater degradation

In comparison to Australia, New Zealand like Britain has plentiful water resources. Until 1967 New Zealand assumed the English common law position which gave riparian proprietors rights to freshwater quality and quantity for reasonable use.[95] This meant water was considered *publici juris* (a public right) until affected by labour.

This conceptualisation was in direct conflict with Māori society, which is based on a horizontal relationship between the land and people. As opposed to seeing the land as something that needed to be broken and tamed, Māori worked with the environment. Correct action was aligned with the seasons and the natural state of the world.[96] Rights were important, but by necessity aligned with responsibilities and obligations to the natural world and the wider community.[97]

The result of treating water as a public good within a framework that favours agriculture and industry is that freshwater bodies have been drastically, often irreparably, damaged and altered in the interests of non-Māori; wetlands famed by Māori for their food gathering resources were drained to make way for the pastoral economy, while industrial pollution desecrated cultural sites and ruined food sources.[98]

Under the *Water and Soil Conservation Act 1967*, Parliament recognised the existence of rights to take, use, discharge and divert water and vested those rights in the Crown.[99] However, the rights of riparian proprietors to access water required for domestic needs and the needs of animals were preserved – an important point in a society where agriculture is highly valued.[100] The rights vested in the Crown fell short of an explicit claim to ownership and the position that nobody owns freshwater has been maintained by the Crown since then.[101]

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95 In New Zealand, the English common law in existence at 14 January 1840 was presumed to have been imported "as far as applicable to the circumstances of the colony" (*English Laws Act 1858 (NZ)*, s 1). For a statement on the English common law on water position see: *McCartney v Londonderry and Lough Swilly Railway Co Ltd* [1904] AC 301 (HL) at 306-307. The extent to which the English common law was applicable to the circumstances of the colony has been a key question which has resurfaced in recent cases considering tikanga (Māori law) as part of the common law.

96 Tau TM, above xxx, at 19, 30–36.

97 Williams Joe, "He Pūkenga Wai" (2019 Salmon Lecture, Resource Management Law Association, 9 October 2019) https://www.courtsofnz.govt.nz/assets/speechpapers/SLW.pdf; Macpherson EJ, *Indigenous Water Rights in Law and Regulation: Lessons from Comparative Experience* (Cambridge University Press) chapter five.

98 For example, Canterbury was extensively drained in the interests of the sheep farming community. The effects on eels and bird life were devastating for Ngāi Tahu. See Waitangi Tribunal, *Ngai Tahu Report* (WAI 27, 1991).

99 *Water and Soil Conservation Act 1967*, s 21.

100 *Water and Soil Conservation Act 1967*, s 21. See *Stanley v South Canterbury Catchment Board* (1971) 4 NZTPA 63 (TCPAB) at 68.

101 Macpherson EJ, above xx at 105-106.

When the *Resource Management Act 1991* was passed into law it was considered to be a world leading approach to integrated environmental management. There also was an expectation from Māori that their concerns and interests would be heard as the Act refers to the Māori relationship with water, *kaitiakitanga* (guardianship) and the principles of the Treaty of Waitangi.[102] However, the common experience of Māori is that when decision-makers consider their concerns and aspirations, this has added little to western concepts of 'stewardship' and 'sustainable development' (factors that decision-makers already have to consider under the Act). As the Waitangi Tribunal has found, Māori concerns are routinely balanced out in decision-making processes in favour of economic development and the priorities of other communities.[103]

While anyone can apply for a consent to take and use water under the *Resource Management Act 1991*,[104] rights are based on a first-in-first served model, favouring the rights of existing users.[105] In fully allocated catchments this means that existing water consents are highly valuable and within this framework, Māori have been largely excluded.[106] Meanwhile, the degradation of freshwater over the last thirty years has been nothing short of staggering. A key driver for the decline in water quantity and quality has been the swift conversion of New Zealand's agricultural industry from primarily sheep to dairy-based.[107] For example, in the last thirty years, dairy cattle numbers increased by 82 percent nationally from 3.4 million to 6.3 million, while in Canterbury dairy cattle numbers have increased tenfold, often in areas particularly unsuited to such agriculture.[108] The conversion was made possible by massive irrigation schemes that drew upon the region's vast aquifer resources. Particularly controversial is the use of nitrates, with a powerful farming lobby arguing that reductions would cripple the industry and have widespread ramifications for the New Zealand economy and rural communities.[109]

The consequences of this can be seen in the effects on freshwater species: statistics show 76 percent of indigenous freshwater fish species are threatened with extinction or at risk of becoming threatened.[110] This has an enormous impact on Māori as freshwater defines the very essence of their identity and well-being economically, socially and culturally.[111] At the same time, Māori have often been deprived of the benefits of freshwater both in terms of water services for their communities and economic development.

The unresolved question of Māori rights and interests

Water rights have been a live issue between the Crown and Māori since the earliest days of colonisation, resulting in complex litigation over different aspects of waterbodies throughout the twentieth century which never satisfactorily resolved questions of rights.[112]

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102 *Resource Management Act 1991*, ss 6(e), s 7(a), 8.

103 Waitangi Tribunal, *Freshwater Report*, above xxx at 64-66.

104 Section 88(1).

105 *Resource Management Act 1991*, sections 124 and 124B. Trevor Daya-Winterbottom, 'Water Management' in Salmon P and Grinlinton G (eds), *Environmental Law in New Zealand* (2nd ed, Thomson Reuters New Zealand, Wellington, 2018) 703 at 723–-724.

106 Macpherson EJ, above xxx, 107-108.

107 Joy M, *Polluted Inheritance: New Zealand's Freshwater Crisis* (Bridget Williams Books, Wellington, 2015).

108 Statistics New Zealand, "Livestock numbers" (14 April 2021) Livestock numbers | Stats NZ.

109 Joy M, "Shifting baselines and political expediency in New Zealand's freshwater management" (2021) 72(4) Marine and Freshwater Research 456.

110 Statistics New Zealand "Extinction threat to indigenous freshwater species" (9 June 2021) https://www.stats.govt.nz/indicators/extinction-threat-to-indigenous-freshwater-species>

111 Williams, Joe, above xxx.

112 See for example, *Poroti No.1 Title investigation* 18 Feb 1895 (1890-1899) Whangarei MB No.05 298; *Lake Omapere* (1929) 11 Bay of Islands MB 253-261.

As noted above, various freshwater rights were vested in the Crown under the *Water and Soil Conservation Act 1967*. However, this falls short of a claim to ownership and the courts have made clear that Māori rights cannot be extinguished by a "side-wind"; for legislation to extinguish indigenous property the wording must be "clear and plain".[113] Furthermore, the Crown has been explicit that no one owns freshwater. This has left a question mark as to the nature and extent of Māori rights in freshwater and the legal conceptualisation of those rights.

In the late 2000s, the issue was brought to a critical juncture when the National government of the day proposed to sell shares in the Crown-owned hydro-electricity generator, Mighty River Power, and a number of other generators. The proposal awoke the question of Māori rights over freshwater as the power generated by Mighty River Power (now Mercury Energy Limited) relies on the use of freshwater in the Waikato River. At the same time, awareness and concern about the impacts of agriculture on treasured waterbodies was growing within Māori groups, as well as the wider community.[114]

In response, a legal challenge was taken to the courts seeking an injunction to secure Māori rights before water use rights passed into private hands.[115] The Supreme Court did not make findings on the matter of ownership, as the decision turned on the issue of the application of Treaty of Waitangi[116] principles and it was found the Crown could still provide redress for Māori water rights if the sale went ahead.[117] The Court noted that the Crown stated it is "open to discussing the possibility of proprietary rights in water, short of full ownership" and expressly committed to achieving "recognition of and redress for Māori rights and interests in water and geothermal resources".[118] On the basis of these assurances, the Supreme Court found that Māori could be confident their claims would be addressed suggesting that the matter was one for political negotiation.[119]

Yet, while the last decade has seen numerous stages of reform and consultation with Māori over freshwater, these have been criticised by the Waitangi Tribunal as deficient both in terms of ensuring freshwater quality and quantity and in recognising Māori proprietary rights in freshwater.[120] Within the New Zealand context, the Waitangi Tribunal has been central to efforts of reconciliation between the Crown and Māori.[121] However, with one exception, the Tribunal only has the power to make recommendations.[122] In its 2019 Stage 2 Report on freshwater, the Tribunal laid bare the failings of the freshwater regime and made numerous recommendations.

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113 *Ngati Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643 at [147]–[154].

114 Down S, above xxx.

115 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6 [*Mighty River Power*].

116 Te Tiriti o Waitangi / the Treaty of Waitangi is a treaty entered into between the Crown and over 500 tribes and subtribes of New Zealand in 1840. In exchange for a right to govern, the Crown made various guarantees including the protection of Māori in exercising their rangatiratanga (self-determination) over their lands and resources. While the Treaty of Waitangi is now accepted as holding constitutional status it is not generally legally enforceable. Since 1975, an increasing number of statutes refer to the principles of the Treaty of Waitangi which has created legally enforceable obligations on the Crown.

117 For comment see Ruru J, "Partial privatisation no material impairment to remedying Treaty breaches – New Zealand Māori Council v Attorney-General [2013] NZSC 6" Māori Law Review.

118 *Mighty River Power*, xxx at [101] and [105].

119 *Mighty River Power*, xxx at [11].

120 Waitangi Tribunal, *Freshwater Report*, above xxx.

121 In 1975, the Waitangi Tribunal was instituted and empowered to make inquiries into Māori grievances arising from breaches of Te Tiriti o Waitangi / the Treaty of Waitangi: *Treaty of Waitangi Act 1975.*

122 *Treaty of Waitangi Act 1975,* section 5. The exception to the non-binding effect of the Tribunal's recommendations is that if land is transferred from a state enterprise, but the Tribunal later recommends that it be returned to Māori ownership, the return will be compulsory. *Treaty of Waitangi Act 1975,* section 8.

Recommendations emphasised the need to address Māori proprietary rights and allocation, strengthen the *Resource Management Act 1991* to accommodate Māori rights and interests, and provide more funding and co-design and co-management opportunities. Yet, aware of their non-binding powers and the lack of progress to date, the Tribunal made pointed remarks that it may "now be necessary for a test case" to be brought before the courts on "whether native title in fresh water (as a component of an indivisible freshwater taonga) exists as a matter of New Zealand common law and has not been extinguished."[123] The Tribunal noted that they had indicated their view, but the matter is yet to be addressed by the courts.[124]

Within the New Zealand context, the Crown policy of buying mass tracts of Māori land coupled with processes for the statutory conversion of Māori title under the Native (latterly Māori) Land Court[125] means Aboriginal title jurisprudence has not developed in the way it has in Australia or Canada. There is therefore scope to avoid some of the limitations of the Aboriginal title jurisprudence that have hampered the recognition of freshwater rights in those countries. It is also possible that the developing recognition of tikanga (Māori law) as part of New Zealand law offers another legal basis for recognising the Māori relationship with freshwater outside of the Aboriginal title paradigm.

Thus, while the Crown and the courts have acknowledged that Māori have rights and interests in freshwater, these remain undefined and unresolved.[126] At the same time, the crisis of New Zealand's freshwater continues to worsen.

Pathways forward

The promise and limitations of co-governance and co-management

There have been some attempts to address Māori concerns and interests in water resources with one-off settlements between the Crown and certain tribal groups. The Whanganui River joint-management agreement instituted in 2017 was ground-breaking in its recognition of the river as a living entity.[127] That agreement establishes Te Pou Tupua as "the human face" of the river, an entity jointly comprised of the Whanganui tribes and Crown representatives to act in the name and interests of the river and to administer a fund to support the health and well-being of the river.[128]

While the agreement has attracted international interest, there are significant shortcomings. Most critical of these is that the consent of Te Pou Tupua is not required for the use of water from the river or its tributaries or discharges to it. Such agreements have also been a way in which the matter of ownership and control of water resources has been bypassed and the status quo maintained. The Waitangi Tribunal has been highly critical of the way the Crown has continuously held out the promise of co-governance and co-management, when the reality is that there are few examples in

123 Waitangi Tribunal, *Freshwater Report*, above xxx, at 564.

124 Waitangi Tribunal, *Freshwater Report*, above xxx, at 564.

125 Native Lands Act 1862; Native Lands Act 1865. For comment see: Williams David V, *Te Kooti Tango Whenua: The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1998); Boast Richard, *Buying the Land, Selling the Land: Governments and Maori Land in the North Island 1865-1921* (Victoria University Press, Wellington, 2008).

126 *Mighty River Power,* above xxx at [101].

127 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*. The idea that nature could be the subject of legal personhood was first articulated by Christopher Stone in 1972. See Stone C, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (3rd ed, Oxford University Press, Oxford and New York, 2010).

128 Erueti A and Down S "International Indigenous Rights and Mining in Aotearoa New Zealand" in Erueti, A (ed), *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017).

practice.[129] Requiring Māori to reach political agreements to help manage specific lakes and rivers is not a solution to the widespread crisis facing freshwater as a resource across the country.

Nonetheless, co-management agreements hold some promise in the articulation of tikanga (Māori law) that they represent. In 2014, Te Urewera, the traditional lands of the Tūhoe people, was recognised as a legal person under legislation.[130] In 1954, the area had been declared a national park, without consultation with Tūhoe. The 2014 legislation removed the unilaterally imposed national park status from the area, which covers 2,000km^2 including Lake Waikaremoana. In 2017, the new Te Urewera Board (containing a majority of Tūhoe appointees) released Te Kawa o te Urewera (Te Kawa), which sets the objectives and policies that will govern the area and is an important expression and codification of Tūhoe laws.[131] In the document, Tūhoe claims moral authority and jurisdiction: "When our laws and rules depart from Te Urewera principles and from our practice of that alive in our traditions and beliefs, they lose moral integrity and authority. They make no sense; they cannot be said to be fair or just."[132] Te Kawa also challenges the assumption that Indigenous people are solely interested in preservation ethics, instead promoting a vision of reciprocity between people and the natural world. Te Kawa states:[133]

> If Te Kawa has a true purpose it is one that hopes to draw people closer to Te Urewera; to respecting the role that people play in achieving nature's balance if we have a wish for a secure future; and to encourage progress that inspires sustainable and disciplined prosperity.

While Te Kawa has a cognisable legal status by virtue of its overseeing legislation, the document stands as an important expression and codification of Tūhoe law irrespective of that statutory underpinning.

Growing recognition of the value of Māori knowledge and the legitimacy of their grievances, as well as the Crown's lack of moral mandate due to environmental degradation, has created a situation where the public, key stakeholders and different levels of government are increasingly open to Indigenous claims of authority. As explored below, there have been a number of examples of Indigenous peoples asserting their laws outside the bounds of formal legal recognition in Canada; Indigenous Protected and Conserved Areas (IPCAs) are a key example. In a context where understandings of Indigenous rights are still developing, this puts directly in issue the self-determination of Indigenous peoples and their rights in relation to water.

To return then to Tūhoe, it is clear that Te Urewera principles have their own moral integrity and authority. If, hypothetically, the Crown had refused to create an exception from the policy that conservation lands are unavailable for settlements with Māori, and Te Urewera Act was never passed, this would still be the case. These principles are an articulation of Tūhoe rangatiratanga (self-determination / authority) based on Tūhoe laws. As explored below, the legal recognition of tikanga by the courts is a critical development which could create space for the recognition of Māori authority based on their own laws.

Recognition of tikanga

Recognition of tikanga (Māori law) by the New Zealand courts is a recent development that may potentially have significant ramifications for Māori freshwater claims. This case law is evolving quickly and has arisen in a wide range of circumstances.

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129 Waitangi Tribunal, *Freshwater Report*, n x, at 313–314.

130 Te Urewera Act 2014.

131 Te Urewera Board, Te Kawa o te Urewera (2017) at 23 https://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera

132 Te Urewera Board, above xxx, at 23.

133 Te Urewera Board, above xxx, at 10.

In 2020, the Supreme Court allowed a deceased Pākehā (non- Māori) man's appeal to continue on the basis that his mana (the Māori concept of status) continues after death.[134] In 2021 the Supreme Court recognised that tikanga was an "applicable law" in its decision to quash a mining company's appeal over a resource consent application.[135]

This jurisprudence remains nascent and questions about how tikanga is part of New Zealand law and tests for its recognitions remain underexplored both in the courts and in academia.[136] There are considerable uncertainties in this area of law, but recent cases have held that rather than just informing the common law, in some cases tikanga will be the binding law to be applied by the courts.[137] In *Ngāti Whātua Ōrākei (No.4)* Justice Palmer held that tikanga is a "separate legal framework" that arises as an "inevitable expression of self-determination" of iwi and hapū (tribes and sub-tribes). While legislation may restrict its exercise, only iwi and hapū can change tikanga.[138]

Of particular importance, is the way in which recognition of tikanga allows for Māori claims to freshwater to be tested on their own terms. While Crown processes and political expediencies have pushed Māori into articulating their freshwater claims in terms of ownership, or a right to culture, for Māori it is their rangatiratanga, or self-determination / authority as guaranteed by the Treaty of Waitangi,[139] which is of most importance as a basis for rights recognition.[140] While the Crown has been consistent in its rejection of tribal political authority as including authority over natural resources, the recognition of tikanga in the courts opens the door to this legal recognition. Recent tikanga cases have acknowledged Māori hold rangatiratanga, drawing upon the guarantee of rangatiratanga under the Treaty of Waitangi.[141]

In November 2020, Ngāi Tahu lodged its claim in the High Court to rangatiratanga or authority over freshwater in its tribal area (extending over the majority of Te Waipounamu / the South Island apart from the northern prow), arguing that their right to rangatiratanga entitled them to exercise their rights, responsibilities and obligations over freshwater.[142] Ngāi Tahu are seeking declaratory relief that the Government ought to work with them to design and implement a new regime for managing freshwater that recognises Ngāi Tahu rights and protects freshwater for future generations. This claim steps outside the Aboriginal title paradigm that has tended to straitjacket Indigenous peoples in their pursuit of self-determination over their traditional lands and resources, instead drawing on

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134 Ruru J and van Beynen M "Christchurch Civic Creche accused Peter Ellis dies while appealing conviction" *Stuff NZ* (online ed, Wellington, 4 September 2019).

134 *Ellis v The Queen* SC 49/2019 [2020] NZSC Trans 19, "Tikanga Appeal", 25 June 2020.

135 *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127. For comment see, Down S and Williams D V "Trans-Tasman Resources: a cautious step forward for Māori rights - Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board [2021] NZSC 127" (October 2021) *Māori Law Review.*

136 *Takamore v Clarke* [2012] NZSC 116, [2013] NZLR 733. See also: *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

137 *Mercury NZ Limited v The Waitangi Tribunal* [2021] NZHC 654; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board* (No 2) [2021] NZHC 29; *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201.

138 *Ngāti Whātua Ōrākei Trust v Attorney-General (No.4)* [2022] NZHC 843.

139 Under art 2 of the Māori language version Te Tiriti o Waitangi.

140 Erueti A, "Māori rights to Freshwater: the Three Conceptual Models of Indigenous Rights" (2016) 24 Waikato Law Review 59.

141 Erueti A, above xxx. Johnston A, "Murky Waters: The Recognition of Māori Rights and Interests in Freshwater" (2018) 24 Auckland University Law Review 39.

142 Maxwell J, "Ngāi Tahu takes Crown to court for 'rangatiratanga' of its waterways" Stuff NZ (online ed, Wellington, 2 November 2020).

the increasing recognition of tikanga in New Zealand law.[143] This is a claim that truly seeks to be heard on Ngāi Tahu terms and not within proprietary notions which are implicit in tests for Aboriginal title recognition. How the Courts will grapple with this challenge remains to be seen.

Canada

The State of Play

Degradation of vast freshwater resource and fragmented western governance systems

Canada has vast freshwater resources. With over two million lakes and rivers - more inland waters than any other country - Canada has 20 percent of the world's freshwater and nine percent of the world's renewable freshwater resources.[144] Freshwater quantity and quality varies across Canada, negatively impacted in regions with significant agriculture, mining, forestry, high population density or a combination of these pressures.[145] Perhaps not surprisingly, given Canada's resource-rich geography, oil, gas and mineral exploitation place particular pressures on freshwater resources, both with respect to extraction and contamination, with potential risks associated with accidental discharges from pipeline infrastructure transporting oil and gas across the landscape also of significant concern. As approximately 60 percent of Canada's fresh water flows north, Indigenous and non-Indigenous people in northern communities are often downstream and particularly affected by water issues associated with the cumulative effects of a range of activities.[146] Parts of northern and western Canada are also more prone to droughts, exacerbated by climate change, with consequential effects on water flow and vulnerability to wildfires.[147] Across Canada's prairies, 70 percent of ecologically invaluable wetlands have been lost, with freshwater ecosystems across Canada experiencing decline due to the cumulative impacts of climate change, pollution, land use, overfishing, and invasive species.[148] Massive flooding and water diversion projects associated with the building of hydroelectric dams also significantly impact watersheds. Groundwater used for drinking water is a particularly significant issue, with dozens of Indigenous communities across Canada suffering from a long-term lack of clean drinking water.[149]

The Constitution of Canada spreads jurisdiction for the management of freshwater resources between the federal and provincial/territorial governments. The thirteen provinces and territories have the primary jurisdiction over freshwater[150] with water generally "vested" and managed by

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143 McHugh P G, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press, Oxford, 2011); For a challenge to the conceptualisation of Aboriginal title as property see: Sanderson D (Amo Binashii) and Singh A C, "Why Is Aboriginal Title Property if It Looks Like Sovereignty?" (2021) 34(2) Canadian Journal of Law & Jurisprudence 417.

144 Environment and Climate Change, *Toward the Creation of a Canada Water Agency Discussion Paper* (Government of Canada) at 4, https://www.placespeak.com/uploads/6321/Canada_Water_Agency_Discussion_Paper.pdf.

145 Environment and Climate Change, *Water Indicators: Water quality in Canadian rivers* (Government of Canada), https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/water-quality-canadian-rivers.html.

146 Environment and Climate Change, n XX at 6.

147 Bush E and Lemmen D (eds) *Canada's Changing Climate Report* (Government of Canada, 2019).

148 Environment and Climate Change Canada, n XX at 4.

149 Indigenous Services Canada, *Ending long-term drinking water advisories* (Government of Canada, March 21, 2022) https://www.sac-isc.gc.ca/eng/1506514143353/1533317130660.

150 The *Constitution Act 1867* assigns the provincial governments responsibility in areas relating to property and civil rights, which allows for the regulation of most types of business and industrial activities (s 92(13)); all matters of a merely local or private nature in the province (s 92(16));

these sub-national governments through individual water legislation.[151] While originally based on the English common law riparian rights rules, differences in climate, geography, and development priorities resulted in the evolution of very different allocation and management systems across the various provinces.[152] The federal government, meanwhile, is assigned jurisdiction in relation to fisheries, navigation, and transboundary matters and has responsibility for managing water on federal lands and lands reserved for Indigenous peoples.[153] This fragmented system of colonial freshwater governance in Canada has largely focused on authorising water use, with little attention to the "underlying ecological conditions of watersheds".[154] By and large, a reactive governance structure evaluates potential impacts from a project or application based perspective rather than addressing cumulative effects or adapting to changing ecological conditions.[155]

Indigenous rights associated with freshwater, such as fishing and harvesting activities, and rights to use water for travel and navigation and domestic, spiritual, ceremonial, cultural or recreational purposes[156] are recognised through historic and modern treaties and the common law. However, little provision is made within the non-indigenous systems for the sophisticated pre-existing governance systems of the hundreds of Indigenous nations in occupation of Canada prior to European contact.[157] Rather, the courts have interpreted the constitutional protection afforded "the

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management of provincial Crown lands (s 92(5)); municipal institutions in the province (s 92(8)); and developing, conserving and managing non-renewable resources (s 92A.

151 See for example, *Water Act 2000* (AB), *Water Sustainability Act 2014* (BC), s 5.

152 Lucas A, *Security of Title in Canadian Water Rights* (Canadian Institute of Resources Law, Calgary, 1990); Brandes O and Curran D, "Changing Currents: A Case Study in the Evolution of Water Law in Western Canada" in Renzetti S and Dupont D, (eds.) *Water Policy and Governance in Canada* (Springer Publishing, Switzerland, 2016) 45 at 51.

153 The *Constitution Act 1867* assigns the Federal government responsibility in areas relating to navigation and shipping (s 91(10)); fisheries, both marine and freshwater (s 91(12)); federal lands (s 91(1A)); "Indians and lands reversed Indians" (s 91 (24)); and the criminal law (section 91(27)). The opening words of section 91 also set out a federal residual power to makes laws for the peace, order and good government of Canada, with the court interpreting this residual power to include interprovincial water pollution (*R v Hydro-Québec* [1997] 3 SCR 213). The *Constitution Act* 1867 does not assign powers to the territories in Canada, who therefore possess only the powers delegated or devolved to them by the federal government (See the *Northwest Territories Act* 1985 (Can); the *Yukon Act* 2002 (Can); and the *Nunavut Act* 1993 (Can).

154 Curran D, "Indigenous Processes of Consent: Repoliticizing Water Governance through Legal Pluralism" (2019) 11(3) Water 571; Curran D and Mascher S, "Adaptive Management in Water Law: Evaluating Australian (New South Wales) and Canadian (British Columbia) Law Reform Initiatives" (2016) (12(2) McGill Journal of Sustainable Development Law 178, 113-115.

155 Curran, n XX at 575–577, 585.

156 Laidlaw D, *Water Rights and Water Stewardship: What About Aboriginal Peoples?* (ABLawg, July 8, 2010), https://ablawg.ca/2010/07/08/water-rights-and-water-stewardship-what-about-aboriginal-peoples/. The courts have also recognized that water may also be "integral to the distinctive culture of the particular aboriginal people" (*R v Sappier; R v Grey* 2006 SCC 54 at para 37, [2006] 2 SCR 686).

157 Curran, n XX at 575; Borrows J, *Recovering Canada: The resurgence of Indigenous Law* (University of Toronto Press, Toronto, 2002). As part of a Safe Drinking Water Class Action Settlement Agreement, the Government of Canada has committed to repealing the *Safe Drinking Water for First Nations Act* 2012 (Can) and replacing it with legislation created in consultation with First Nations and support for First Nations to develop their own safe drinking water by-laws and initiatives (Indigenous Services Canada, *News Release: Courts Approve Settlement Agreement to Resolve Class Action Litigation Related to Safe Drinking Water in First Nations Communities* (Government of Canada, December 21, 2021), https://www.canada.ca/en/indigenous-services-canada/news/2021/12/courts-approve-settlement-agreement-to-resolve-class-action-litigation-related-to-safe-drinking-water-in-first-nations-communities.html.

existing Aboriginal and treaty rights of the Aboriginal peoples of Canada"[158] as embodying a largely procedural duty on the Crown to "consult and accommodate",[159] and allowed federal and provincial governments to justify activities that otherwise infringe aboriginal rights.[160] Modern water statutes, in turn, recognise the need to consult Indigenous nations, and consider Indigenous knowledge and impacts in decision-making processes. However, they fail to acknowledge Indigenous rights to water and fail to recognise jurisdiction or rights of governance for Indigenous communities.[161]

The relatively new federal *Impact Assessment Act 2019* (Can) also contemplates an expanded role for cooperation and substitution of assessment processes with recognised "Indigenous governing bodies,"[162] with a preambular nod to Canada's commitment to implementing the UNDRIP. However, final decision-making remains "in the political realm"[163] of the federal government, where Indigenous knowledge systems risk being incorporated into existing western decision-making processes.[164] And, as in New Zealand, Indigenous peoples' interests are balanced out in the name of economic development and the broader public interest. Indigenous challenges to such decision-making tend to focus on procedural rights afforded by non-indigenous administrative and constitutional systems, with no fora available to challenge the "scope and scale" of governance within a watershed.[165]

Developing principles relating to cumulative impacts on treaty rights within the Western framework

Indigenous rights and interests within Canada are recognised through a complex array of historic treaties, modern treaties, and common law Aboriginal rights. Large parts of Canada are covered by historic land cession treaties which purport to "cede or surrender" territory outside reserves, while recognising specified treaty rights, most commonly to fish, hunt and trap, throughout territories not "taken up" by the Crown. In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the Supreme Court of Canada (SCC) was asked to consider how far the constitutional protection of treaty rights extends when the Crown exercises its right to take up lands for development purposes. The SCC held that a *prima facie* infringement of a treaty right occurs only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt [or fish] remains".[166] The Court was of the view that the procedural duty to consult was sufficient to provide pre-emptive protection from substantial impact.[167] Subsequent courts have acknowledged that in many parts of Canada the consultation-focused *Mikisew* infringement

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158 *Constitution Act*, 1982, s 35. The term "Aboriginal peoples of Canada" used in s 35 is defined to include the First Nation, Inuit and Métis peoples of Canada.

159 *Haida Nation v BC*. 2004 SCC 73, [20]–[35]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [54], [63]). Band councils of First Nation reserve lands elected under the *Indian Act* and some Indigenous governments operating under a land claims agreement (modern treaty) or self-government agreement with the Crown also have some shared responsibility.

160 *R. v Sparrow* [1990] 1 SCR 1075, 70 DLR (4th) 385, [1109]; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [119].

161 Curran, n XX, 576. See for example *Water Sustainability Act 2014* (BC) and the *Impact Assessment Act 2019* (Can). See also: Wright D, *Indigenous Engagement and Consideration in the Newly Proposed* Impact Assessment Act*: The Fog Persists* (ABlawg, February 27, 2018), https://ablawg.ca/2018/02/27/indigenous-engagement-and-consideration-in-the-newly-proposed-impact-assessment-act-the-fog-persists/.

162 *Impact Assessment Act*, ss 2 and 21.

163 Wright,n XX.

164 Von der Porten S, de Loë R and McGregor D, "Incorporating Indigenous Knowledge Systems into Collaborative Governance for Water: Challenges and Opportunities" (2016) 50 Journal of Canadian Studies/Revue d'etudes canadiennes 214.

165 Curran, n XX at 282.

166 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at [48].

167 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at [55].

approach presents the very real risk that "the extinguishment of [treaty rights] will be brought about through the cumulative effects of numerous developments".[168]

However, the Supreme Court of British Columbia recently held in *Yahey v British Columbia*, 2021 BCSC 1287 that the province of British Columbia had infringed Treaty 8 by "permitting the cumulative impacts of industrial development to meaningfully diminish [the Blueberry River First Nation's] exercise of its treaty rights".[169] While only a lower court decision, *Yahey* sets an important precedent, the implications of which may assist Indigenous nations protect freshwater resources (in relation to which treaty rights exist) from cumulative impacts of activities which are together significantly eroding water quality or diminishing flow.

Unresolved questions relating to common law Aboriginal title to water and submerged lands

While much of Canada is subject to historic land cession treaties and modern treaties, large parts of British Columbia and eastern Canada are not. In these parts of the country, Indigenous rights and interests are determined by the Court. In 1997, the SCC held in its landmark decision in *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 that Aboriginal title to land was recognised at common law. Aboriginal title includes the right to exclusive use, occupation and possession including the right to choose the uses to which land can be put, subject only to an inherent limit to not destroy the ability of the land to sustain future generations of aboriginal peoples and to justifiable infringement by the Crown.[170] In *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, the SCC reiterated these principles, and refined the requirements applicable to justifiable infringement with a focus on consent of Aboriginal title holders.[171] Yet, while Indigenous peoples do not view water as separate to land,[172] the Canadian courts have still not unequivocally recognised the existence of Aboriginal title to water, or the submerged lands under water.

Two recent lower court decisions have recently considered this issue and flagged several unresolved issues associated with finding Aboriginal title to a navigable waterway or its submerged bed.[173] For Justice Kent in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* 2022 BCSC 15, these questions include:

1) whether such title can exist under Canadian law given the public right of navigation;

2) whether the test for Aboriginal title to dry land from *Tsilhqot'in* is applicable to (and appropriate for) submerged land or bodies of water; and if so,

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168 *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at [79] ((per Justice Sheila Greckol (concurring).

169 *Yahey v British Columbia*, 2021 BCSC 1287 at [1884]. For a full discussion of this case, see Hamilton R and Ettinger N, *Yahey v British Columbia and the Clarification of the Standard for a Treaty Infringement* (Ablawg, September 24, 2021), https://ablawg.ca/2021/09/24/yahey-v-british-columbia-and-the-clarification-of-the-standard-for-a-treaty-infringement/.

170 *Delgamuukw*, n XX at [166].

171 Mascher, S, Today's Word on the Street - "Consent", Brought to You by the Supreme Court of Canada (ABlawg, July 8, 2014), https://ablawg.ca/2014/07/08/todays-word-on-the-street-consent-brought-to-you-by-the-supreme-court-of-canada/.

172 See for example, submission of the Union of British Columbia Indian Chiefs (UBCIC) relating to proposed water legislation in British Columbia, as discussed in Council of Canadians, *Water Rush: Why B.C.'s Water Sustainability Act Fails to Protect Water*, (https://canadians.org/sites/default/files/publications/report-BC-water-act-0116.pdf), at 10.

173 *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc* 2022 BCSC 15 and *Chippewas of Saugeen First Nation v The Attorney General of Canada* 2021 ONSC 4181.

3) how sufficient, exclusive occupation should be evaluated in the context of a body of water or submerged land.[174]

Justice Kent did not answer these questions, on the basis that the evidentiary record did not warrant consideration of the claim on the merits. However, he did note in obiter that the "conflict between the exclusivity of Aboriginal title and the primacy of the public right of navigation might still provide a potentially insurmountable barrier to a finding of Aboriginal title, suggesting a "best-case claim" might be one to the waterbed under "a land-locked lake, fully bounded by land to which Aboriginal title has been found, and to which access has been historically and exclusively controlled by the titleholders."[175] Such a narrow approach would necessarily greatly diminish recognition of Aboriginal title in relation to larger freshwater bodies and this is an issue the SCC will ultimately be called on to determine.

Another issue flagged by Justice Kent in *Saik'uz First Nation*, is the role the UNDRIP and associated legislation will play when the SCC does finally grapple with this question. British Columbia has passed legislation affirming the UNDRIP's application through the *Declaration on the Rights of Indigenous Peoples Act* 2019 (BC). The Canadian government has also passed its own legislation, *United Nations Declaration on the Rights of Indigenous Peoples Act* 2021 (Can) with the stated purpose to "affirm the Declaration as a universal international human rights instrument with application in Canadian law" and to provide a framework for the federal government's implementation of the declaration. The preamble to the federal legislation expressly states that "the Declaration is affirmed as a source for the interpretation of Canadian law". As Justice Kent of the British Columbia Supreme Court noted in *Saik'uz First Nation*, *"UNDRIP* states in plain English that Indigenous peoples […] have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories".[176] While ultimately reaching a determination in *Saik'uz First Nation* without relying on the UNDRIP, Justice Kent clearly recognised that the Supreme Court of Canada will be called on to explore the effect the federal UNDRIP legislation will have on the existing common law, appearing to suggest when the two are in conflict that the UNDRIP may serve as the more preferable approach.[177] He concluded by stating: "It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title" - suggesting at the least it "supports a robust interpretation of Aboriginal rights".[178]

Pathways forward

Towards collaborative Consent through co-governance and co-management

While still underacknowledged in much of Canada, there is a growing number of collaborative co-governance and co-management models being developed in relation to freshwater resources. This is particularly so in British Columbia, where the vast majority of Indigenous Nations have not signed historic or modern treaties and assert jurisdiction over their unceded traditional territories.

Several different factors motivate the move to co-governance of freshwater resources, including recognition of the value of local knowledge,[179] recognition that complex environmental issues

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174 *Thomas and Saik'uz First Nation,* n XX at [318].

175 *Thomas and Saik'uz First*, n XX at [331]–[332].

176 *Thomas and Saik'uz First*, n XX at [208].

177 *Arend J. Hoekstra* G and *Thomas I*, *BCSC Decision Suggests Implications for UNDRIP Legislation in Canada* (Cassels, 01/18/2022). https://cassels.com/insights/bcsc-decision-suggests-implications-for-undrip-legislation-in-canada/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

178 *Thomas and Saik'uz First*, n XX at [212].

179 Turner N, Ignace M and Ignace R, "Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia" 2000 10(5) Ecological Applications 1275.

require multiple forms of knowledges,[180] a need to address water security issues within Indigenous Nations,[181] growing acknowledgment of the importance of achieving collaborative consent to recognise Indigenous Nations as equal partners in decision-making processes,[182] and recognition of commitments to implement the UNDRIP.[183]

Experience with co-governance models has not been uniformly successful. Commentators point to differences in assumptions as to how Indigenous knowledge systems and laws can be incorporated into decision-making, with empirical research revealing success does depend on how knowledge is integrated, and the role that it plays, in collaborative colonial processes. A study of four collaborative processes relating to water governance in British Columbia revealed "perceived functional and ontological challenges of Western-scientific versus Indigenous perspectives on water and environmental governance", and the difficulty of aligning differing world views for the purposes of collaborative decision-making.[184] Ultimately, the question of where the decision-making power lays remains a challenge, with a risk that Indigenous knowledge and laws are diluted, assimilated, and co-opted into colonial decision making processes.[185] An essential element in moving towards a model of collaborative consent is requiring non-indigenous institutions to share power, with the co-management spaces created within the system ensuring Indigenous partners are recognised as holding legitimate authority.[186]

Emerging Pathways to Recognize Freshwater Resources as Rights Holders

Drawing on experience in jurisdictions like New Zealand, conversations around recognising the legal standing and rights of freshwater resources themselves are beginning in Canada.[187] One river in Canada has been recognised as a legal person through joint resolutions of the regional municipality and the Innu Council of Ekuanitshit. The resolutions grant the Magpie River nine legal rights in accordance with Innu customary law, including the right to flow, the right to maintain natural biodiversity, and the right to sue.[188] However, it remains to be seen how the courts will respond to these declarations and issues of jurisdiction, with the provincial government interested in developing this river to generate hydro-electric power. And, as commentators have recognised, while protecting the rights of nature can be done in a way that is consistent with the rights of

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180 Weatherhead E, Gearheard S and Barry R, "Changes in Weather Persistence: Insight from Inuit Knowledge" (2010) 20(3) Global Environmental Change 523.

181 Longboat S, "First Nations Water Security: Security for Mother Earth." (2015) 30(2-3) Canadian Woman Studies / les cahiers de la femme 6.

182 Phare M, Simms R, Brandes O and Miltenberger M, *Collaborative Consent and British Columbia's Water: Towards Watershed Co-governance* (Centre for Indigenous Environmental Resources and Polis Project on Ecological Governance, September 2017), https://poliswaterproject.org/files/2017/09/CollaborativeConsentReport.pdf.

183 Polis Project on Ecological Governance, *Xwulqw'selu Water Sustainability Plan Celebrating a Milestone Decision in B.C.* (March 17, 2022), https://poliswaterproject.org/2022/03/17/xwulqwselu-water-sustainability-plan/.

184 Von der Porten, de Loë, McGregor, n XX at 214–243.

185 Von der Porten, de Loë, McGregor, n XX at 214–243.

186 Phare, Simms, Brandes and Miltenberger, n XX at 26-30.

187 See for example: Environmental Law Centre, *Reimagining Rivers Webinar Series: Law's Relationship with the North Saskatchewan River* (2022), https://elc.ab.ca/reimagining-rivers-webinar-series-laws-relationship-with-the-north-saskatchewan-river-2/.

188 Townsend J, Bunten A, Iorns C and Borrows L, *Why the first river in Canada to become a legal person signals a boon for Indigenous Rights* (The Narwhal, June 11, 2021). Chloe Berge "This Canadian river is now legally a person. It's not the only one" National Geographic, 15 April 2022; Chloe Rose Stuart-Ulin "Quebec's Magpie River becomes first in Canada to be granted legal personhood" Canada's National Observer, 24 February 2021 https://www.nationalobserver.com/2021/02/24/news/quebecs-magpie-river-first-in-canada-granted-legal-personhood.

Indigenous peoples (including their rights to self-government), it is also true that rights of nature laws enacted within the non-indigenous system may be designed and implemented in a way that challenges Indigenous authority and rights of governance.[189] Moving forward, if they are to be embraced more fully, care must be taken to ensure rights of nature laws are not "yet another instrument for imposition of settler colonial decisions on Indigenous peoples, lands and waters.[190]

Resurgence of Indigenous laws and exercise of jurisdiction

In response to the inadequacies of non-indigenous freshwater governance systems, a number of Indigenous Nations have begun asserting their inherent rights and responsibilities over freshwater within their territories. This resurgence of inherent rights does not rely on the state to create space to recognise a role for Indigenous law, rather the space is simply occupied in a way that avoids otherwise dependent and reactionary relationships[191] - to create parallel processes to non-indigenous laws that "declare expectations and responsive action".[192] This leads to the "repoliticizing" of water governance, repositioning authority beyond 'settler'-defined Aboriginal rights and the legitimacy of non-indigenous water governance systems.[193]

A method used by Indigenous governments to assert jurisdiction and exercise inherent rights and responsibilities over land and water resources is the declaration of Indigenous Protected and Conserved Areas (IPCAs). IPCAs are "lands and waters where Indigenous governments have the primary role in protecting and conserving ecosystems through Indigenous laws, governance and knowledge systems"[194] for the benefit of future generations. A form of self-determination, Indigenous governments unilaterally declare IPCAs asserting jurisdiction based on their inherent rights over the territories and assume the primary role in establishing and determining the objectives, management plans and governance structures.[195] For example, on April 28, 2022 the *sməlqmíx*, the *syilx* people of the Similkameen Valley in British Columbia declared an IPCA over the *nʔaysnúlaʔxʷ snxaʔcnitkʷ* (Ashnola Watershed) in its entirety (the nʔaysnúlaʔxʷ IPCA).[196] Asserting spiritual obligations and sovereign responsibilities over the land and water within this unceded watershed, the IPCA establishes the health of the lands and waters prior to contact as a benchmark

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189 Garrett R and Wood S, *Rights of Nature Legislation for British Columbia: Issues and Options* (CLE Working Paper No 1/2020, August 2020), https://allard.ubc.ca/sites/default/files/2020-08/RON%20Legislation%20Working%20Paper%20-%20FINAL%20-%2019%20August%202020.pdf at 11.

190 Garrett and Wood, n XX at 11-12.

191 Coulthard G, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. (Univ Of Minnesota Press, Minneapolis, 2014).

192 Curran, n XX at 578.

193 Curran, n XX at 578.

194 Indigenous Circle of Experts, *We Rise Together Achieving Pathway to Canada Target 1 through the creation of Indigenous Protected and Conserved Areas in the spirit and practice of reconciliation: Report and Recommendations* (March 2018), https://static1.squarespace.com/static/57e007452e69cf9a7af0a033/t/5ab94aca6d2a7338ecb1d05e/1522092766605/PA234-ICE_Report_2018_Mar_22_web.pdf#page=9.

195 Conservation Through Partnership, *Indigenous protected and conserved areas* (undated), https://conservation-reconciliation.ca/about-ipcas.

196 iʔ ◡ səmlqmíx, *Our Connection to the Land and Water is Sacred: nʔaysnúlaʔx w iʔ ḱłluxwnwixwmntət Declaring the Ashnola watershed as a sməlqmíx protected and conserved area: Legal Backgrounder* (April 28, 2022), https://wcel.org/sites/default/files/publications/2022-04-26-for-web-ashnola-ipca-legal-backgrounder-booklet.pdf; see also West Coast Environmental Law, *nʔaysnúlaʔxw iʔ ḱłluxwnwixwmntət: The Declaration of the Ashnola Protected and Conserved Area* (June 13, 2022), https://wcel.org/blog/naysnulaxw-i-klluxwnwixwmntt-declaration-ashnola-protected-and-conserved-area?utm_source=LEB.

against which to "set a pathway to healing/target for restoration"[197] and expects individuals, recreational users, forest companies and those who have acquired a form of tenure from the Crown to "bring themselves into good standing with the water, land, air and tmixʷ to respect the IPCA".[198] To restore healthy forest management practices, the IPCA communicates an intention to "work with non-sməlqmíx timber operations / companies to help them 'to move on' from the IPCA area in a timely way.[199] Stating that mining is not permitted within the IPCA area, the IPCA establishes the expectation that the Crown will not approve any new mining tenements and advises existing mining to "voluntarily abandon their claims" or face legal action.[200] In relation to water, which is viewed as "over-licensed, mismanaged and polluted", the IPCA states that the sməlqmíx will work with existing water licensees "to ensure their uses are consistent with sməlqmíx / syilx law" (which includes the "rights of the tmixʷ to environmental flows necessary to thrive") and improve processes to ensure water is not contaminated.[201] Future water use within the IPCA, meanwhile, is to be "guided by a sməlqmíx watershed plan, and sməlqmíx water quality standards".[202]

Another method through which Indigenous Nations are asserting inherent rights and responsibilities over freshwater resources is by establishing Indigenous water management regimes within their territories. The first such regime in Canada was put in place in 2016 by the Nadleh Wut'en and Stellat'en First Nations through the Yinka Dene 'Uza'hné Surface Water Management Policy[203] and its accompanying Yinka Dene 'Uza'hné Guide to Surface Water Quality Standards.[204] The Policy is founded on the Nations' Indigenous water laws, which laws are translated into water management policies establishing water quality and quantity parameters applicable to all new and existing projects that have the potential to impact the Nations' Aboriginal title and rights.

Finally, some Indigenous Nations are also asserting jurisdiction over projects proposed in their traditional territories by establishing impact assessment processes based on their Indigenous laws in parallel to federal and provincial assessment processes. The first Indigenous Nation to take this step in Canada was the Stk'emlúpsemc te Secwépemc Nation (SSN). Under Secwépemc law, the SSN are yecwemínem, meaning caretakers and stewards, of Pípsell (also knowns as Jacko Lake and surrounding area) which is a "historically significant keystone site" within their traditional territory.[205] Faced with a proposed copper/gold mine project at Pípsell, the SSN asserted title over the area, which asserted title included the right to self-govern and determine future use objectives using traditional governance models, and then initiated an SSN assessment of the mine.[206] The process was "[b]uilt on the principle of Walking on Two Legs- Secwépemc and Western support",

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197 West Coast Environmental Law, n XX.

198 nʔaysnúlaʔxʷ iʔ k̓ ɬuxʷnwixʷmntət, Declaration of the Ashnola sməlqmíx Protected and Conserved Area: Frequently Asked Questions (undated), at 3, https://www.lsib.net/blog/wp-content/uploads/2022/04/2022-04-25-FAQ-re-Ashnola-IPCA_public-PDF.pdf.

199 nʔaysnúlaʔxʷ iʔ k̓ ɬuxʷnwixʷmntət, n XX, at 3.

200 nʔaysnúlaʔxʷ iʔ k̓ ɬuxʷnwixʷmntət, n XX, at 3-4.

201 nʔaysnúlaʔxʷ iʔ k̓ ɬuxʷnwixʷmntət, n XX, at 4.

202 nʔaysnúlaʔxʷ iʔ k̓ ɬuxʷnwixʷmntət, n XX, at 4.

203 Yinka Dene 'Uza'hné Surface Water Management Policy (Yinka Dene 'Uza'hné Surface Water Management Policy, Version 4.1 May 18, 2016. http://darac.sg-host.com/wp-content/uploads/Yinka-Dene-Uzahne-Surface-Water-Management-Policy-March-18-2016-00303183xC6E53.pdf.

204 Yinka Dene 'Uza'hné Guide to Surface Water Quality Standards, Version 4.1 May 18, 2016, http://darac.sg-host.com/wp-content/uploads/Yinka-Dene-Uzahne-Guide-to-Surface-Water-Quality-Standards-March-18-2016-00303157xC6E53.pdf.

205 Stk'emlúpsemc te Secwépemc Nation, *Honouring our Sacred Connection to Pípsell: Ajax Decision Summary*, https://stkemlups.ca/wp-content/uploads/2013/11/2017-03-ssnajaxdecisionsummary_0.pdf.

206 Stk'emlúpsemc te Secwépemc Nation, n XX.

using both traditional and western knowledge, with a "long view" that considered intergenerational impacts and in-depth examination of factors currently lost in the non-indigenous impact assessment processes including "intangible" spiritual and cultural impacts.[207] At the completion of the assessment process, the SSN determined "it does not make sense to sacrifice for all time all that we have in Pípsell to obtain limited monetary and other benefits which will last for only 25 years" and determined it would not give its free, prior, informed consent.

By proactively asserting rights and declaring expectations and responsive actions within these contested spaces, Indigenous Nations are at times inviting, and at other times forcing, deeper reflection on how to reconcile relationships with the colonial state.[208] The Yinka Dene 'Uza'hné Surface Water Management Policy, for example, was framed as a "pathway of collaboration" to which the provincial regulator has responded by using the Policy to set agreed-upon water quality objectives and incorporating it into permits relating to mining activities.[209] Private interests are also collaborating, using the Policy to prepare mitigation and management plans and aligning proposed projects with the Policy's principles.[210] The information provided through the SSN Pípsell assessment was embedded and considered in the joint assessment process of the provincial and federal governments[211] and informed the Governor-in-Council's ultimate decision that the significant adverse environmental effects associated with the proposed mine project could not be justified in the circumstances.[212] And while IPCAs do not depend on federal, provincial or territorial governments for their creation, some Indigenous Nations do choose to enter into partnership arrangements with governments who recognise the value of IPCAs. The Canadian government has recently recognised Canada's international conservation targets[213] cannot be met without the support and consent of Indigenous Nations and has committed to support Indigenous-led conservation operationalised by IPCAs. In turning away from the colonial systems failing freshwater resources (and ecosystems generally) and towards the assertion of inherent rights and responsibilities, Indigenous Nations have provoked some movement towards the creation of an "ethical space" that "respects the integrity of all knowledge systems," within which to begin real conversations about the sharing of jurisdiction and responsibilities.[214]

However, the legal space remains highly contested, particularly when the economic interests of the settler state are engaged.[215] Sourced in the inherent rights and responsibilities held by Indigenous

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207 Stk'emlúpsemc te Secwépemc Nation, n XX.

208 Asch M, Borrows J and Tully J, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press, Toronto, 2018).

209 Curran, n XX at 578.

210 Spencer M, Simms R and Brandes O,*Watershed 2018: A Bundle of Seven Freshwater Focused Events* (Edited Proceedings, 2018), https://poliswaterproject.org/files/2018/12/Watersheds-2018_FINAL.pdf, at 10.

211 Canadian Environmental Assessment Agency and Environmental Assessment Office, Ajax Mine Project Joint Federal Comprehensive Study / Provincial Assessment Report, August 2017 https://www.ceaa-acee.gc.ca/050/documents/p62225/119687E.pdf, at iv.

212 Government of Canada, Decision Statement, June 27, 2018, https://ceaa-acee.gc.ca/050/evaluations/document/123178?&culture=en-CA%20.

213 Environment and Climate Change Canada, *Canada, Joins the High Ambition Coalition for Nature and People* (Sept 28, 2020).

214 Indigenous Circle of Experts, n XX.

215 See for example the conflict around expansion of the TMX Pipeline, which was rejected by the Tsleil-Waututh Nation following an assessment undertaken in accordance with the Tsleil-Waututh's Stewardship Policy based on their inherent jurisdiction and law" but nevertheless approved to proceed by the Canadian government following the discharge of the duty to consult (Tsleil-Waututh Nation Band Council Resolution, Resolution in respect of Tsleil-Waututh Nation's Stewardship Policy

Nations over their territories, IPCAs, Indigenous water management regimes, Indigenous impact assessment regimes occupy a legal grey space within the Canadian colonial legal system. Two cases currently moving through the Canadian courts may go some way to create space within that system to recognise and protect these inherent rights. Notably, in *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 (CanLII), the Quebec Court of Appeal held that s 35 of the Canadian *Constitution Act*, 1982 recognises a "generic" inherent Aboriginal right of self-government.[216] Meanwhile, *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 raises unanswered important questions regarding Indigenous law-making authority, particularly whether the source derives from Indigenous peoples' own inherent laws and practices, and the constitutional recognition afforded.[217] Canada's highest court will hear each of these cases, and the resulting decisions will be of significance in understanding whether meaningful space for Indigenous laws and jurisdiction exists within Canada's colonial constitutional order.

Conclusion

As noted at the outset, Indigenous water rights are emerging as a critical contemporary issue in many countries. Responses to the claims, questions and challenges explored in this article hold great significance for the cultural and economic wellbeing of many Indigenous communities – communities that have successfully utilised, cared for, managed and shared these water resources for countless generations. Yet these issues have come into focus at a time when there is also growing awareness of the cumulative contemporary impacts of over-use, diversion, pollution, cyclical drought, and climate change. There is fierce competition in this space for political attention,[218] and in the shadow of that the law is being asked to retrace its slow and torturous path to land justice to find the piece that it largely left behind – water justice.

Past failures to understand and accommodate Indigenous water rights appear to have been a product of various factors - including the inflexibility of property law concepts preoccupied with ownership and use, the dominance of western priorities in the water context, and stubbornly narrow conceptions of Indigenous existence that first missed the communal and spiritual nature of connections to water, and then denied their economic and governance dimensions. These old trajectories in thinking (and others) are visible everywhere in the country histories examined in this article.

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decision about the Trans Mountain Pipeline and Tanker Expansion Proposal (May 21, 2015), http://twnsacredtrust.ca/wp-content/uploads/2015/05/2015-05-21-TWN-BCR-re-TMEX.pdf. See also Treaty, Lands and Resources Department Tsleil-Waututh Nation, Assessment of the Trans Mountain PipeLine and Tanker Expansion Proposal https://www.dropbox.com/s/c93izznlaedpxsk/TWN%20Assessment%20Report%2011x17.pdf?dl=0).

216 *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis Children, Youth and Families*, 2022 QCCA 185 (CanLII). See also: McNeil, K, *The Inherent Indigenous Right of Self-Government* (ABlawg, May 4, 2022), https://ablawg.ca/2022/05/04/the-inherent-indigenous-right-of-self-government/; Hamilton, R, *Is the Act respecting First Nations, Inuit and Métis children, youth and families Constitutional* (ABkawg, April 28, 2022), https://ablawg.ca/2022/04/28/is-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-families-constitutional/.

217 Gunn, K, 'Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority' (2022) 31(2) Constitutional Forum 17.

218 Godden L, Jackson S and O'Bryan K, 'Indigenous Water Rights and Water Law Reforms in Australia' (2020) 37 EPLJ 655, 666.

Contemporary legal progress has shown itself to be slow, expensive and selectively dispute driven. And policy progress (as has been seen) can be piecemeal, politically fragile, and often gravitates to procedure over substance. Particularly in a contested field such as water there is an ever-present risk that permeable consultation provisions and tokenistic representation can hinder real progress on shared governance and economic inclusion. Even the 'rights of nature' initiatives around rivers in various countries – which obviously hold great potential where they genuinely advance Indigenous representation, processes and aspirations[219] - can harbour some ongoing confinement of Indigenous voices to advisory roles and potentially still be something of a distraction from critical questions around shared management and economic rights.[220]

Yet clearly the socio-political context in which these challenges are being considered has changed. In recent years there have been significant advances in the development of international Indigenous rights standards, including in the context of water.[221] Moreover, within countries such as Australia, Canada and New Zealand there has been a gradual confluence and strengthening of Indigenous voices, and a deepening public understanding of the issues. Most importantly, in all of the countries examined here, Indigenous communities are now themselves asserting their needs and priorities clearly, and making increasingly compelling demands for genuine space to be made for the recognition of their rights, laws and knowledges in the context of freshwater resources. And there is positive progress underway.

In Australia, in the critical Murray-Darling Basin, there are signs of strengthening consultation and representation regimes and at least some promise of increased First Nations' access to the water markets. Some unique progress has emerged in parts of northern Australia, bolstered by larger First Nations populations and land holdings (and in the case of Western Australia the benefit of hindsight on the south-eastern experiences). The northern progress is not without its challenges – including some over-allocation and infrastructure shortage (in Queensland and the Northern Territory). Yet these emerging models are important precedents. And critically in the Australian context, given the long deference of water planning policy to native title processes, there has been a renaissance in the native title jurisprudence that is now producing a more resilient 'native title' with expanding use entitlements. These developments hold significant potential in the water context.

The crisis facing New Zealand freshwater resources, and the partial privatisation of freshwater assets by the government, has put the matter of freshwater rights centre stage for Māori. Despite Crown promises to address Māori freshwater rights and interests – and the Waitangi Tribunal's recommendations – progress on this issue has been slow. Specific co-governance and co-management arrangements have provided some progress for some tribal groups but are an incomplete answer to Māori rights and concerns over freshwater. Importantly, however, co-governance and co-management arrangements have also contributed to a broader-reaching shift in New Zealand. In particular, the emergence in this context of Māori articulations of their own laws over freshwater and their strengthening claims for this law to be recognised – both legally and politically – has been a key development. Importantly, these articulations of Māori law emphasise traditional principles of reciprocity, responsibility and sustainable economy that have long been ignored in western conceptions of Indigenous connections to water. How the Courts build on their recent recognition of tikanga (Māori law) and respond to the recent Ngāi Tahu claim to have their

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219 See eg O'Bryan K, 'Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria' (2017) 20 *Australian Indigenous Law Review* 48.

220 See generally O'Donnell E, Poelina A, Pelizzon A and Clark C, 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9 *Transnational Environmental Law* 403.

221 See particularly the earlier discussion of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the 2018 Brasília Declaration of Judges on Water Justice.

rangatiratanga or self-determination over freshwater recognised will be a key test for the project of reconciliation in New Zealand.

In Canada, there has been some belated resistance in lower court case law to the cumulative erosion of treaty rights – which holds some significance in the context of water. And co-governance or co-management models have emerged around specific freshwater resources, albeit not always successful in terms of aligning world views for collaborative decision-making and ensuring equal contribution. In Canada there has also been some government recognition of Indigenous laws and jurisdiction in specific locations – although still with some challenges in implementation. Most significantly, bolstered by advances in Aboriginal title jurisprudence and firming domestic support for the UNDRIP, some Indigenous nations have themselves been proactively asserting their rights, responsibilities and/or jurisdiction over their territories, sometimes with positive reception from governments. This is an attempt to move beyond the framework of consultation and accommodation that has seen cumulative impacts depleting and degrading resources and to press for political recognition, in keeping with UNDRIP, of Indigenous Nations' legitimate authority in relation to resource governance.

There is a common thread in these transnational advances – a resurgence of and growing respect for Indigenous laws, knowledges and processes. Australian native title claimants, after a generation of narrow implementation of *Mabo*, have successfully begun a re-purposing of the doctrine to incorporate a fuller accommodation of traditional laws and customs to produce a stronger and broader interest. In New Zealand, Māori have drawn upon the specific and evolving recognition of tikanga by the courts to re-frame the critical outstanding questions over their freshwater rights in terms of recognition of Māori laws and rights of governance. And in Canada, some Indigenous Nations are 'occupying' the recognition space through the assertion on the ground of jurisdiction and the authority of traditional laws. These are all potentially significant inroads into the contested space of freshwater management. Each opens new opportunities for Indigenous voices – that have too long been ignored – to be better heard and understood. A new relationship is within reach, and freshwater is shaping as an important test - and perhaps as the catalyst for broader success. However, work must continue to ensure western freshwater governance systems continue to clear space to allow this to happen. An important aspect of the challenge is to acknowledge that Indigenous Nations' claims to have their laws, processes and knowledges recognised is not one of the complex obstacles to water security, but rather a part of the solution.